Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-58

CLYDE ORTON,
Petitioner,

vs.

STATE OF MISSOURI, Ex Inf., JOHN C. DANFORTH,
Attorney General of Missouri,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court for the State of Missouri

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To the Supreme Court for the State of Missouri

The Petitioner prays that a Writ of Certiorari issue to review the Judgment of the Supreme Court of Missouri entered in the above cause on March 8, 1971, and which became final when Petitioner's Motion for Rehearing was denied on April 12, 1971.

OPINIONS BELOW

The opinion of the Supreme Court of Missouri is reported at 465 SW2d 618 together with the Dissenting Opinion of Judge John E. Bardgett. On the Court's own Motion, the Opinion was modified on April 12, 1971, and the Order of Modification is as follows:

> "In Re: Modification ordered on April 12, 1971:
>
> On page 11, line 16 from top, 'perhaps as many' is deleted and 'a larger number of' is substituted in lieu thereof.
>
> On page 18, line 10 from top, 'including the transportation of liquor bound for other states' is deleted.
>
> On page 18, **added to line 2 of the last paragraph,** is 'until the end of his present term expiring December 31, 1972,' so that the conclusion now reads: 'It is ordered that respondent is ousted from the office of Sheriff of Pemiscot County until the end of his present term expiring December 31, 1972, and the costs of this proceeding are taxed against him.' "

The Opinion of the Supreme Court of Missouri as modified by the Court appears at Appendix A.

JURISDICTION

The Judgment of the Supreme Court of Missouri was entered on March 8, 1971, and Petitioner's Motion for Rehearing was denied on April 12, 1971. The jurisdiction of this Court is invoked under 28 USC 1257(3).

QUESTIONS PRESENTED

This was an original quo warranto proceedings filed in the Supreme Court of Missouri to oust Petitioner from the office of Sheriff of Pemiscot County, Missouri, for alleged misconduct. Motions and the Answer of Petitioner attacking the jurisdiction and requesting trial by jury were denied. Petitioner's Motion for an evidentiary hearing before the Court was likewise denied and the case referred to a Special Commissioner, the Honorable Ray Weightman, a retired Judge living in Florida. After an evidentiary hearing before the Special Commissioner consuming approximately ten days, the Special Commissioner filed his report recommending that Petitioner be ousted from the office of Sheriff. The case was heard upon oral argument before the Supreme Court of Missouri, on January 21, 1971. Petitioner's Motion for two hours of time to present the complicated and lengthy factual and legal issues was denied. Petitioner was limited to fifty minutes to present both his argument upon the facts and the applicable law. The Supreme Court of Missouri adopted the findings and recommendations of the Commissioner in the opinion as reported at 465 SW2d 618 (Appendix A). The questions presented are:

1. Whether Petitioner was found guilty of charges not made, whether there was lack of notice of charges for which Petitioner was found guilty, and whether the findings were so vague so as to deny Petitioner due process of law.

2. Whether reference to a Special Commissioner and the refusal of the Supreme Court of Missouri to hear only fifty minutes of argument by Petitioner on the facts and the law of the case, and the refusal of the Supreme Court of Missouri to rule upon substantive issues raised by Petitioner was an abdication of

the judicial function, and a denial of opportunity to be heard before the Supreme Court of Missouri, in violation of due process of law.

3. Whether the denial of a jury trial was a denial of due process of law as held by the dissenting opinion of Judge John E. Bardgett, where there is a clear state constitutional and statutory right of jury trial, and where the right of a jury trial under the majority opinion is left to the uncontrolled discretion of the Attorney General of Missouri in selecting his forum.

4. Whether the record is totally devoid of any evidentiary support for the findings against the Petitioner, in violation of due process of law.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional provisions involved is the due process clause of the Fourteenth Amendment to the United States Constitution and Article VII, Section 4 of the Constitution of Missouri, 1945, which is as follows:

> "Except as provided in this constitution, all officers not subject to impeachment shall be subject to removal from office in the manner and for the causes provided by law."

The statutory provisions involved are Sections 106.220 to 106.280, R. S. Mo. and Sections 558.110, 563.410, 311.420, 311.450, R. S. Mo., which appear at Appendix B.

STATEMENT OF THE CASE

1. The Amended Information filed in the Supreme Court contained specific charges of misconduct. Paragraph 4 of the Information and the subdivisions thereof charged Petitioner's failure to enforce the liquor control law, "* * * in the following respects: (R. pp. 31 and 129)

A. Respondent allowed the selling of liquor and beer without a license by: J. B. and Mae Snow at the 'Big Apple', Hayti, Missouri; Pearl Isom at 'Paul's Place', Caruthersville, Missouri; Sadie M. Covington at the 'Blue Room', Caruthersville, Missouri; Kathryn Slater at 'Slater's Blue Note', Hayti, Missouri; Roy Davis at Davis Liquor Store, Hayti, Missouri; West End Tavern, Hayti, Missouri; South End Cafe, Hayti, Missouri; O'Malley's Tavern, Steele, Missouri, and the selling of liquor on Sunday and after hours by the Climax Bar, Caruthersville, Missouri, and Bill Lester's Grocery, Deering, Missouri, in violation of Sections 311.050 and 311.290 RSMo.

B. Respondent allowed gambling in liquor establishments through the conduct of dice and card games, and betting on pool games at 'Graue Grocery and Liquor Store', Hayti, Missouri; 'Club Zanza', Hayti, Missouri; and the 'Kozey Korner', Caruthersville, Missouri.

C. On or about September 23, 1969, Respondent threatened to jail Louis Harper, Clyde Greer, Bill Burns, Keith Roberts and Tommy Walker, Alcohol Beverage Control agents from Mississippi, if they did not leave Pemiscot County.

D. On or about July 6, 1967, Respondent refused assistance to Florence, Alabama police officers, Roy White and Hollis Briggs, when they asked his help

to stop transportation of whiskey from Pemiscot County to Alabama.

E. Respondent knew or should have known of open, notorious and widespread violations of the liquor laws in Pemiscot County from January 1957 to date but in neglect of his duties failed to enforce Chapter 311 RSMo."

The Supreme Court of Missouri failed to make findings with respect to these charges and made the following general finding, "* * * failure to enforce liquor laws * * *". (Appendix A, Page 19.)

After Motion for Re-hearing was filed, the Supreme Court of Missouri, on its own Motion, deleted from the above quoted finding the following phrase, "including the transportation of liquor bound for other states." However, the Court elsewhere in its Opinion finds Petitioner guilty of failure to enforce the State liquor law requiring certain documents to accompany shipments of more than five gallons (Appendix A, Pages 18-19). No such charge was ever made and as is hereinafter set forth, the record is totally devoid of any evidentiary support for such finding.

In paragraph 5 of the Amended Information and subdivisions A through K thereof (R. 3-5), Petitioner was specifically charged with alleged acts of oppression. There was no allegation or charge concerning the so-called, "Cleatus Stanfill incident". In its Opinion, the Supreme Court of Missouri finds Petitioner guilty of such misconduct (Appendix A, Page 17) and as is hereinafter set forth, the record is totally devoid of any evidentiary support for such finding.

In paragraphs 3I, 4D and 5I of the Amended Information, Petitioner is charged with:

"Refused assistance to Florence, Alabama police officers * * * when they asked his help in stopping the transportation of whiskey from Pemiscot County to Alabama" (R. 2-3-4).

The Supreme Court of Missouri finds Petitioner guilty of threatening these officers (Appendix A, Page 7) based upon Petitioner's vicarious responsibility for a statement made in Petitioner's presence by another person, the Chief of Police. There is no such charge in the information. The Opinion (Appendix A, Page 8) states that no objection was made to the testimony on that ground and hence, the Information will be amended. This ruling overlooks the fact that a hearsay objection was repeatedly made to this testimony (R. 175-178) and the Commissioner sustained the objection (R. 178), but some two months later the Commissioner, while writing his report, changed his ruling without prior notice to Petitioner and no opportunity was given to object on additional grounds. Furthermore, by allowing the Information to be amended, the Opinion has taken an inconsistent position in that this alleged act of misconduct occurred in a previous term and if the Court does not base ouster on incidents occurring in previous terms, there is an inconsistency in permitting an amendment to allege such misconduct.

3J of the Information (R. 2), is charged with allowing cards and dice games in violation of Section 563.410, RS Mo. in the following specific places:

Club Zanza, Hayti, Missouri;
Cozy Corner, Caruthersville, Missouri;
Truckers Lounge, Hayti, Missouri;
Big Apple, Hayti, Missouri;
Paul's Place, Caruthersville, Missouri;
Covington's Blue Room, Caruthersville, Missouri;
Slater's Blue Note, Hayti, Missouri;
Steele Pool Hall, Steele, Missouri;
Craven's Pool Hall, Caruthersville, Missouri;
Ed James' Pool Hall, Hayti, Missouri.

Section 543.410 provides for a maximum punishment of $250.00 fine and no imprisonment unless played with a minor. In paragraph 3K of the Information (R. 2) Petitioner is charged with allowing betting on pool games at the Club Zanza, Hayti, Missouri, in violation of Section 563.390, R. S. Mo., a misdemeanor. In response to these specific charges, the Supreme Court of Missouri found Petitioner guilty of, "* * * failure to enforce gambling laws * * *." (Appendix A, Page 19.) Missouri has many, "gambling laws" in addition to the section (563.410) which Petitioner is charged with failing to enforce. See Section 563.350 to 563.590, R. S. Mo. Furthermore, as will be more fully covered hereafter, the record is totally devoid of any evidentiary support of such finding.

All of the foregoing matters were called to the attention of the Supreme Court in Petitioner's Motion for Rehearing (R. 89-105).

2. Petitioner filed a Motion for an evidentiary hearing before the Supreme Court of Missouri which was denied by the Court (R. 133-134). The Missouri Court referred the whole case to a Special Commissioner, Ray Weightman, a retired judge, to hear all the testimony and file his findings of fact and conclusions of law. An evidentiary hearing was conducted by the Special Commissioners and no member of the Supreme Court saw or heard any of the testimony of some 104 witnesses. The only hearing before the Supreme Court afforded petitioner was a limited argument of fifty minutes to cover a record of testimony consisting of some 1,566 pages and the applicable law (R. 138-139). Petitioner's Motion for an enlargement of time was denied. Under the state of this present record, the Petitioner has been ousted by a Court which in the first instant asserts jurisdiction to hear the case, then refuses to hear the testimony and delegates the authority to hear the testimony to a Special Commissioner and then only allows fifty minutes for Peti-

tioner to present its statement of facts and arguments of law concerning a trial lasting ten days involving 104 witnesses and 1,566 pages of testimony. The failure of the Court to afford petitioner a hearing was again brought to the attention of the Supreme Court of Missouri in Paragraph 9, Page 16 of Petitioner's Motion for Rehearing (R. 104).

Petitioner raised the insufficiency of the information to state a claim for relief insofar as Paragraph 3 was concerned and Petitioner's Brief before the Supreme Court of Missouri under Point X fully briefed and covered this point. This paragraph of the Information purports to allege petitioner's violation of Section 106.220, which requires a, "willful or fraudulent violation or neglect". Nowhere in Paragraph 3 of the Information has, "willful or fraudulent" conduct been charged. The Supreme Court of Missouri did not rule on this point and in fact, was not even mentioned in the opinion. The matter was again called to the attention of the Supreme Court in Paragraph 10, Page 16 of Petitioner's Motion for Rehearing (R. 104, 131-132, and 135-137).

3. The dissenting opinion of Judge John E. Bardgett of the Missouri Supreme Court held that the procedure employed in this case by the Supreme Court of Missouri did not, "comport with due process" (Appendix A, Page 27). In Petitioner's Answer (Paragraphs 2 and 4, R. 10), the denial of trial by jury was raised and again raised in Paragraph 11 of Petitioner's Motion for Rehearing (R. 104).

There is no Statute or law of procedure in Missouri setting forth any guide lines as to when the Attorney General of the State may proceed by quo warranto. The selection of the forum, and hence whether there is trial by jury, and right of appeal is left to the unbridled discretion of the Attorney General of Missouri. It is not sur-

prising to find that the Attorney Generals of Missouri have consistently resorted to quo warranto proceedings where trial by jury is denied. See for example the following cases:

State ex. inf. McKittrick v. Wymore, 343 Mo. 98, 119 S.W.2d 941 (banc 1938);

State on inf. McKittrick v. Williams, 346 Mo. 1003, 144 S.W.2d 98 (banc 1940);

State on inf. McKittrick v. Wiley, 160 S.W.2d 677 (Mo. 1942);

State ex. inf. McKittrick v. Wilson, 166 S.W.2d 499 (1943);

State ex. inf. Taylor v. Cumpton, 240 S.W.2d 877 (1951);

State ex. inf. Dalton v. Mosley, 365 Mo. 711, 286 S.W. 2d 721 (banc 1956);

State ex. inf. Eagleton v. Elliott, 380 S.W.2d 929 (Mo. banc 1964).

There is no case cited in the Annotated Statutes of Missouri, in which the Attorney General of Missouri has proceeded under Section 106.220, R.S. Mo. et seq. and afforded the charged officer trial by jury and right of appeal.

4. The record is totally devoid of any evidentiary support of the findings against the Petitioner. The record discloses only sporadic dice playing among poverty stricken Negroes, and occasional social card games. There is no evidence of any organized or professional gambling, nor of any public or private demand or campaign to take affirmative action. Mere existence of law violations is insufficient for ouster; otherwise every officer in the state would be subject to ouster. The record is totally devoid of any evidence that petitioner's conduct was willful. The record affirmatively shows that no action has been requested or demanded of petitioner by the Attorney General

and his predecessors in office, the Governor and his predecessors in office, the liquor control department and their predecessors in office, the highway patrol, the circuit court or prosecuting attorneys. In fact, the liquor control agents assigned to Pemiscot County stated that no such open notorious violations exists and the offer to prove by the liquor control agent that the number of liquor violations in Pemiscot County is no greater than any other county of comparable size was rejected. The record affirmatively reflects petitioner's good reputation and cooperative attitude in law enforcement substantiated by the testimony of the Lieutenant (now Commander) of Highway Patrol Headquarters of Troop E, the sheriffs of every adjoining county, prosecuting attorneys of adjoining counties, the circuit judge of this circuit, ministers of the gospel and members of the farming and business community in Pemiscot County. The Attorney General admits that he has not initiated any action to enforce the liquor control law or to abate any gambling establishment in this county as he is required to do, if such exists, by Section 311.750, R.S.Mo., Section 311.770(3), R.S.Mo., and Section 563.365 (2), R.S.Mo.

The Opinion of the Missouri Supreme Court fails to consider in its Opinion the following material matters of evidence:

(a) The testimony of one of the State's principal witnesses, the Chief enforcement officer of the Liquor Control Department, that Petitioner never failed to fully cooperate with the Liquor Control Department and that his department had always received complete cooperation and that before coming to Pemiscot County in connection with his undercover investigation he had never heard of any reports of violations of the liquor control law in Pemiscot County (R. 275-276).

(b) That Sections 311.770(3), 311.740 and 311.750 requires that the Attorney General initiate injunction suits

to enjoin violations of the liquor control laws, but the attorney general had initiated no such action in Pemiscot County (Page 29, Deposition of Danforth, R. 89-90).

(c) That the Attorney General of Missouri had never requested or instructed any State law enforcement agency or Sheriff Orton to take action against the shipment of liquor into a foreign state (Deposition of Danforth, Page 7, R. 90).

(d) That the Attorney General has not caused to be criminally prosecuted any of the persons involved in the alleged dice and card games mentioned in paragraph 3J of the Amended Information, or the betting on pool games alleged in paragraph 3K of the Amended Information, or the selling of liquor without a license alleged in paragraph 4A of the Amended Information, or the gambling in liquor establishments alleged in paragraph 4B of the Amended Information (R. 90-91).

(e) That the Attorney General failed to furnish any evidence or information with respect to alleged liquor and gambling violations to Petitioner prior to initiating the ouster suit (R. 91).

(f) The Attorney General admitted that the supervisor of Liquor Control had not furnished any list of liquor complaints to the Prosecuting Attorney of Pemiscot County as required by Section 311.780 R. S. Mo. (R. 91).

(g) That there was no public demand upon the Attorney General to initiate the ouster proceedings and in fact the Attorney General had received only 1 letter prior to the filing of the ouster suit complaining of conditions in Pemiscot County and this letter related to the alleged mistreatment of a juvenile by the juvenile authorities (R. 91).

(h) Liquor Control agents assigned to Pemiscot County testified there was no open, notorious violations of the liquor laws and the Court refused an offer of proof that the liquor agents would testify that the number of liquor viola-

tions in Pemiscot County were no greater than any other county of comparable size (R. 1097-1100, R. 1104, R. 1108).

(i) Petitioner's offer to prove by the Prosecuting Attorney of Pemiscot County that the enforcement of liquor and gambling laws were better than in Kansas City where he previously served as Assistant Prosecuting Attorney was denied (R. 1248-1249).

(j) The headquarters of the Highway Patrol by letter instructed the State Troopers not to arrest anyone transporting liquor out of Pemiscot County (R. 1208-1209).

(k) The Court finds (Appendix A, page 19) Respondent guilty of failing to enforce the law concerning permits and other documents pertaining to the transportation of more than five gallons of liquor and cites in support Section 311.420, but the Opinion overlooks the fact that Section 311.420 provides in part:

> "* * * nor shall it be necessary to procure a license to transport liquor purchased from a retail liquor dealer duly licensed by the supervisor of liquor control of the State of Missouri * * *."

The only evidence of transportation during Petitioner's current term was from the Mississippi liquor agents who had Eddie & Jay's, the Climax and the Casanova under surveillance (R. 89), all of which were licensed retail liquor dealers and the whiskey they observed being loaded was out of the Climax Bar (R. 82), which was a licensed retail dealer.

(l) The Court states (Appendix A, page 18) that Petitioner admittedly failed to cooperate with officers from other states, but overlooked the fact that Mississippi liquor agents were instructed not to notify any Missouri liquor or law enforcement authorities including the Liquor Control Department, the Highway Patrol, the Attorney General or the Sheriff's Department (R. 83-84, R. 108-110, R. 135, R.

158) and the only officers from other states ever requesting cooperation was Sheriff Stone and Sheriff Orton gave Sheriff Stone full cooperation (R. 1443-1446) and two Alabama officers who testified they furnished Sheriff Orton a list of Alabama automobiles transporting liquor and they never heard anything further from him and that it was not unusual for them to make such a request and not hear from it (R. 200) and the Alabama officers were treated politely and cordially and had no complaints about how they were treated (R. 187, R. 204).

(m) The admitted fact that the members of the State Highway Patrol who saw negroes playing dice games in their presence did not arrest or take any other action as required of them by Section 43.190 which provides in part:

> "The members of the patrol shall have authority to arrest, without writ, rule, order or process any person detected by him in the act of violating any law of this State."

(n) In the Opinion (Appendix A, page 10), it is erroneously stated that the Hayti City marshal was contacted by a delegation of citizens, "* * * about the taverns selling liquor on Sunday;" and in the Opinion it is erroneously stated that Respondent signed a letter, "* * * requesting that eleven taverns there remain closed until after the Sunday morning church services * * *." There was no evidence concerning selling of liquor on Sunday or that these places were taverns. The only evidence describes these places as cafes or establishments and the complaint was about people being drunk on Sunday. The problem confronting the City marshal was the fact that the colored people would consume beer and wine and become intoxicated and there are a number of package liquor stores in the vicinity (R. 588-594).

(o) The Court states (Appendix A, page 9) that there were liquor sales to minors at Davis Drive-in in Hayti, but

overlooks the fact that arrests and prosecutions were made for such sales and the matter referred to the Liquor Department because the prosecutor had no right to revoke the liquor license (R. 339-R. 467, R. 1179-1180 and R. 1193).

(p) The Opinion overlooks the testimony of Chief Liquor Enforcement Franklin that most of the liquor violations he observed were violations of regulations only (R. 283-284, R. 290-291, R. 292-293, R. 294, R. 296-298) and Franklin's testimony that the Sheriff had no enforcement authority over violations of such regulations (R. 281-282):

> "Q. Now isn't it a fact that violations of the regulations of the Liquor Control Department on licensed premises, many of them are not violations of the criminal law of the State of Missouri.
> A. That is right.
> Q. Isn't it also true that the sheriff or other law enforcement agencies other than your department are not charged or have no power or authority or responsibility with respect to enforcing the regulations of your Liquor Control Department, do they?
> A. No."

(q) Prior to the modification of its Opinion on April 12, 1971, the Court stated,

> "Quite a number of people testified that the reputation of Pemiscot County for violations of the liquor and gambling laws was bad. On the other hand, Petitioner, in presenting his case, presented perhaps as many witnesses who testified that the reputation of the county for law enforcement was good."

This statement was a complete mis-statement and by its modification on April 12, 1971, the Court deleted the phrase, "perhaps as many" and substituted, "a larger number of" (R. 72, 108, and 120). The statement as modified by the Court still fails to consider the evidence and

overlooks the fact that Respondent produced only five witnesses who so testified and that Petitioner presented the following witnesses who testified that the reputation of Pemiscot County was good: Rev. Currie of the Presbyterian Church; Rev. Barrett of the Episcopal Church; Circuit Judge Ragland, Prosecuting Attorney of New Madrid County, Hal E. Hunter, Jr., Sheriff Ramsey of New Madrid County, Sheriff Dennis of Scott County, Sheriff Simmons of Mississippi County, Sheriff Berryman of Mississippi County, Arkansas, Deputy Sheriff Raines of Dunklin County, Superintendent of Schools Hutchison, Attorney Ray Klemp former Prosecuting Attorney of Dunklin County Baker, Prosecuting Attorney Stephenson, Area farm loan manager of Equitable Life, Berl Cohoon, Horace Dunagan, President of First State Bank and President of Bank of Hayti, Charles House, owner of House Supermarket, Luther Johnson, a barber; Plant Supervisor of the Colson Corporation Howell; farmer and ginner, Rushing; Charles Neely, operator of the International Harvester agency; Joe R. Tipton, employer of approximately 250 people and engaged in the manufacturing business; Wayne Myracle, farmer of approximately 1,250 acres; and Cuz Moreland, radio manager of KMIS (R. 1265-1364).

(r) The evidence showed only sporadic dice playing among impoverished negroes and occasional social card games, both of which are violations of Section 563.410 prohibiting card or dice playing, "for money, property or gain" which is punishable only by a maximum fine of $250.00 and no imprisonment unless played with a minor. Indigents cannot be imprisoned for failure to pay a fine and the opinion overlooks and fails to state just what effective law enforcement action could be taken by the sheriff and ignores the fact that no other law enforcement agency, including the attorney general or highway patrol, has taken any affirmative action. This statute is a trivial offense as indicated by the inaction of the attorney general

and the highway patrol and is commonly violated with impunity in country clubs and private homes throughout the State of Missouri.

(s) The original opinion based judgment of ouster upon Petitioner's failure to enforce the liquor control law, "including the transportation of liquor bound for other states". After Petitioner's Motion for Re-hearing was filed, the Court on its motion, deleted the aforesaid phrase from its Opinion (R. 79, 108 and 127). However, the Court elsewhere in the Opinion found Petitioner guilty of such failure (Appendix A, pages 18-19). Nowhere in the Information is Respondent charged with any such failure and the Opinion sets forth no evidentiary basis for such finding, and in fact, there is none. The language of the Court demonstrates there was no evidentiary basis for such finding in that the Court states, "* * * it would appear" and, "* * * it is doubtful" (Appendix A, page 19).

(t) The Court states (Appendix A, page 8), "obviously" that the Chief of Police and the Sheriff were engaged in a joint investigation or mission of, "some kind" yet the Court does not state any evidence in support of the assertion that it is, "obvious" nor does the Opinion define the joint mission, except "some kind".

(u) The Opinion overlooks the evidence that the Mississippi liquor agents had loaded pistols in their automobiles without Missouri permits (R. 113, R. 87, R. 155); that they were using illegal or, "hot" Missouri license plates which they knew to be a violation of Missouri law (R. 156-157); they had walkie-talkie radios and binoculars (R. 88 and R. 159-160); they admitted that Sheriff Orton had received complaints about them acting strangely and having people under surveillance (R. 166); and they admitted that a person planning to burglarize a place would drive around it several times observing it (R. 163) and that they were instructed to conceal their identity from the Missouri authorities although it was customary to

notify local law enforcement agents (R. 165-166) and the fact that the Mississippi officers were not assaulted and no abusive language was used toward them and there was merely a verbal exchange between the two officers and the fact that mere words do not constitute malicious oppression in office unless carried into action, which was admittedly not done in this case. The evidence is undisputed that only words were used and beyond that nothing was done to interfere with them (R. 204).

(v) The Court states (Appendix A, pages 18-19) that the failure to file a report of fees three weeks late, "* * * would not likely be, of itself, a sufficient reason for ouster * * *" but on the following page it is enumerated as the fourth ground for ouster. Such ruling is contradictory and inconsistent and overlooks the plain provisions of Section 51.150(5) which provides its own penalty for violation as follows, "* * * and any official who fails to do so shall not receive any remuneration for his services until he complies with the provisions * * *".

Each of these matters was specifically called to the attention of the Supreme Court of Missouri in Petitioner's Motion for Rehearing (R. 89-98).

REASONS FOR GRANTING THE WRIT

1. This case raises important substantive due process questions concerning lack of notice of charges and the extent to which due process requires a State Supreme Court to make specific findings in response to specific charges and to make its findings in accordance with some ascertainable standard.

Petitioner was charged in the Information with specific acts at specific places, yet the Supreme Court of Missouri only made the most general findings of guilt (Appendix A, Page 19). Furthermore, the Petitioner was found guilty of charges not even made, the so called, "Incident Involving Alabama Officers", "Cletus Stanfill Incident", and "Sale of Liquor for Transportation Into Nearby States". After Motion for Rehearing was filed calling these matters to the attention of the Court (R. 99-103), the Missouri Court gave only limited relief by deleting the phrase, "sale of liquor for transportation into nearby states", but left this finding standing elsewhere and took no action as to the "Cletus Stanfill Incident" and the, "Incident Involving Alabama Officers" (Appendix A, Pages 17-18).

In **Cole v. Arkansas, 333 U.S. 196, 92 L.Ed.2d 644**, the Court stated:

> "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal."

In holding, that Arkansas denied **Cole** due process, the Court stated,

> "It is as much a violation of due process to send an accused to prison following conviction of a charge

on which he was never tried as it would be to convict him upon a charge that was never made."

Furthermore, as a corollary to the rule announced in **Cole** the findings of the tribunal must be responsive to the specific charges made. Petitioner stands convicted not only of charges not made, but of general findings not responsive to the specific charges made. Of what benefit is the constitutional requirement of "notice of the specific charge" if the tribunal is not constitutionally bound to try and decide the specific issue charged? In effect, Petitioner has been convicted of charges never made or tried.

Furthermore, the Opinion does not disclose any ascertainable standard nor any judicial determination of what evidence was considered in determining Petitioner's guilt. The Opinion purports to limit its findings to acts occurring in Petitioner's current term commencing January 1, 1969, but a substantial portion of the Opinion was devoted to evidence of alleged misconduct in previous terms (Appendix A, Pages 7, 9-15, 17). There is no determination in the Opinion below of whether the evidence was considered in determining the guilt for the alleged subsequent acts occurring after January 1, 1969, or if it was so considered to what extent or on what issues it was considered. The Opinion below purports to find the facts and make conclusions of law, which are vague and uncertain. By analogy, the, "void for vagueness" rule is especially pertinent. If a statute establishing punishment for criminal conduct must pass constitutional muster and not be, "void for vagueness", then a fortiori, a judicial opinion of the highest court of the state should not be vague and should disclose ascertainable judicial standards, or specific judicial determinations in deciding the issues presented to it.

2. Implicit in the requirement for opportunity to be heard is that the hearing granted be a meaningful one.

Petitioner, by Motion, asked the Supreme Court of Missouri to hear the evidence which was denied (R. ....). The case was referred to a retired judge who heard the testimony of some 104 witnesses covering 1,566 pages of the Transcript as well as numerous exhibits. The Supreme Court of Missouri denied Petitioner's Motion for two hours to present the case and limited Petitioner to fifty minutes (R. ....). This case squarely presents important questions concerning the type and quality of hearing which must be given to comply with due process; whether a court which must find the facts as well as determine the law can delegate or abdicate this function to a, "special commissioner", and whether after having done so, the Court can deny adequate time to present the whole case upon the record. The Federal Courts in exercising their power under Rule 53(b) to refer a case to a master have been rather stringently limited. See for example, **LaBuy v. Howes Leather Company, 352 U.S. 249, 1 L. ed. 2d 290,** holding that reference to a master was improper and stating,

> "On the contrary, we believe that this is an impelling reason for trial before a regular experienced trial judge rather than before a temporary substitute * * *."

Although Rule 53 (b) is not applicable to State Courts, due process requires a meaningful hearing before the tribunal.

Also, due process requires that the tribunal rule upon the substantive issues presented. The Opinion below ignores Petitioner's contention that Paragraph 3 of the Information did not state a claim for relief because there was no allegation that the conduct was, "willful, or fraudulent violation or neglect" required by Section 106.220 (R. 104). This case squarely raises the important procedural question of how far under the due process

clause a State Supreme Court can go in delegating its decision making authority to, "special commissioner" and the extent to which it can limit the time for presentation of the issues before it, and ignore substantive issues presented.

3. In the well reasoned and forceful dissent of Judge Bardgett from the Opinion Below (Appendix A; pages 80-87), he stated that the procedure employed in this case, "did not comport with due process" (Appendix A, Page 86), and pointed out that whether or not a public officer in Missouri is entitled to a jury trial is left solely to the discretion of the Attorney General in Missouri in selecting his forum (Appendix A, page 86). It is not surprising to find that the Attorney Generals of Missouri have consistently selected a forum in which jury trial was denied. Missouri's Constitution, Article VII, Section 4, in clear language provides that removal from public office, "except those subject to impeachment shall be in the manner provided by law". A comprehensive Missouri Statutory scheme has been enacted, **Section 106.220 and 106.280, R.S.Mo.** (Appendix B). Despite this clear state constitutional direction, the majority denies trial by jury and right of appeal. This case raises due process questions of the power of a state to leave the decision as to whether a person accused by the Attorney General can have a jury trial or not, to the uncontrolled discretion of his adversary, the Attorney General, and whether a state can ignore the plain provisions of its own constitution in granting the Attorney General this uncontrolled discretion.

4. The record is totally devoid of evidentiary support for the findings against Petitioner which is clearly a denial of due process. See **Shuttlesworth v. Birmingham, 382 US 87, 15 L ed 2d 176, 86 S Ct. 211** and **Thompson v. City of Louisville, 362 US 199, 4 L ed 2d 654, 80 S Ct. 624.** The

statement of the record evidence has already been summarized on pages 9-17 of this Petition and will not be repeated here. The evidence was insufficient to constitutionally support a finding of guilt. Such a result is contributed to by the practice of referring a case to a, "Special Commissioner" to hear the evidence, and the refusal to grant an adequate hearing before the tribunal charged with responsibility of deciding the issues of fact and law.

With respect to the alleged failure to enforce the law against dice playing, Section 563.410 (Appendix B), it is a petty offense punishable only by a fine of $250.00 and no imprisonment. The evidence discloses only sporadic violation of this petty offense by impoverished negroes. Because Petitioner did not discriminate against these negroes by charging them with an offense that is violated with impunity in the white social clubs throughout the State of Missouri and did not initiate a futile prosecution, futile because an indigent cannot be constitutionally imprisoned because of non-payment of a fine, the Opinion below finds Petitioner guilty of willful neglect to enforce this law. The same is largely true of the alleged liquor law violations. Most of these violations were petty offenses, some of which only involve violations of liquor regulations which were not crimes and over which Petitioner had no jurisdiction. Furthermore, it is admitted that there was no demand by the public, the news media, the Prosecuting Attorney, a Grand Jury, the State Highway Patrol, the Attorney General or the Governor that Petitioner take any action with respect to these alleged violations prior to the initiation of ouster proceedings. The Attorney General has initiated no such actions even after filing the ouster suit and the Liquor Control Department and the State Highway Patrol have at least co-equal law enforcement authority with respect to the alleged gambling and

liquor violations. Under these circumstances we respectfully submit that the record is totally devoid of any substantive evidence that Petitioner willfully failed to enforce these laws.

CONCLUSION

For the foregoing reasons Petitioner respectfully requests that the Writ of Certiorari be granted.

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Counsel for Petitioner

APPENDIX

APPENDIX A

In the Supreme Court of Missouri
En Banc

State of Missouri ex inf. John C. Danforth, Attorney General,
Relator,
vs.
Clyde Orton,
Respondent.
No. 55,364.

OPINION

(Filed March 8, 1971)

Original proceeding in quo warranto commenced on January 16, 1970, upon the filing of an information by the Attorney General by which he seeks to oust respondent from the office of Sheriff of Pemiscot County. The information charged respondent with misconduct and neglect of duty in a number of respects hereinafter discussed. We appointed Hon. Ray Weightman as Special Commissioner to hear the evidence and report his findings of fact and conclusions of law. Judge Weightman held extensive hearings and has filed here a report in which he found that respondent had violated his duties in a number of respects and, by reason of such misconduct, had forfeited his office and should be ousted.

The first point raised by respondent is that "the court is without jurisdiction to hear this quo warranto proceedings because Art. VII, § 4, Constitution of Missouri, and § 106.220 et seq., RSMo, vests exclusive jurisdiction in the

circuit court to hear such actions." He recognizes, of course, that Art. V, § 4, Mo. Cons. 1945, vests this court with jurisdiction to "issue and determine original remedial writs" and that quo warranto is such a writ. He contends, however, that the broad power thus bestowed is restricted as it relates to removal proceedings by the provisions of § 4, Art. VII; as follows: "Except as provided in this constitution, all officers not subject to impeachment shall be subject to removal from office in the manner and for the causes provided by law," and that, in accordance with said section, the legislature has enacted §§ 106.220[1] et seq. which provide grounds and procedure for removal of county officers in a circuit court action, and he asserts that such procedure is exclusive.

The precise point now before us was ruled adversely to the respondent's contention in the case of State ex inf. McKittrick v. Wymore, 343 Mo. 98, 119 S. W. 2d 941. In Wymore (a proceeding to remove a prosecuting attorney), under a somewhat similar constitutional provision, it was held that this court had jurisdiction to issue, hear, and determine writs of quo warranto and that statutory enactments (the predecessors of § 106.220 et seq.), also providing a method for removing officers, were not exclusive and did not interfere with the jurisdiction of this court. The question was raised again and the holding of Wymore was reaffirmed in State ex inf. Taylor v. Cumpton, 362 Mo. 199, 240 S. W. 2d 877. Another attack was made on our jurisdiction, upon the same grounds, in State ex inf. Dalton v. Mosley, 365 Mo. 711, 286 S. W. 2d 721, a proceeding to remove a sheriff. In Mosley it was contended that the prior cases were not controlling because of the new (present) constitutional provision adopted in 1945. In ruling the contention adversely to respondent this court stated: "[W]e are unable to discern any real difference

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[1] Statutory references are to RSMo 1969, V.A.M.S.

in meaning and effect between it [the predecessor constitutional section] and the corresponding section of the present Constitution, Art. VII, § 4, so that as regards the claim of exclusiveness of the statutory remedy, this case stands on the same footing as, and is controlled by the doctrine of, the Wymore case, in consequence of which the jurisdictional question raised by respondent is ruled against him." 286 S. W. 2d l.c. 723.

Recognizing that if we follow Wymore and Mosley he cannot prevail on this point, respondent contends that those cases were incorrectly decided and should be overruled. Our view is that the question before us was settled, under both constitutional provisions, by the Wymore and Mosley decisions and should no longer be considered to be an open question. We have, nevertheless, reviewed both cases and consider that they were soundly decided and that they are controlling here. The jurisdictional question is therefore decided adversely to respondent.

Our learned Special Commissioner has filed a 43-page report in which he discusses the evidence in detail and arrives at certain conclusions of fact and law. He found against respondent on some eleven charges, in favor of respondent on three charges, and considered it unnecessary to make findings on a number of others. We will confine our discussion to those charges which were found by the Commissioner to warrant forfeiture and ouster. The question arises as to the weight and effect to be given the findings and conclusions of the Commissioner. We have stated that " 'the findings of fact of a special commissioner are not binding, but are persuasive [State ex inf. v. Arkansas Lumber Co., 260 Mo. 212, 169 S. W. 145], or, as said in State ex inf. v. Kansas City College of Medicine & Surgery, 315 Mo. 101, 285 S. W. 980, 983, 46 A.L.R. 1472, "the conclusions of the commissioner are not binding on this court, but they are advisory and helpful." ' 128 S. W.

2d 1037. We conclude that it is our duty to make a full and complete review of the testimony and to reach our own conclusions as to the law and facts. We may, however, consider the persuasive effect of the commissioner's findings and, if we see fit, defer to his findings of fact based upon conflicting testimony." State on inf. Eagleton v. Stupp Bros. Bridge & Iron Co., Mo. Sup., 380 S. W. 2d 382, 394. We have read this transcript (consisting of more than 1,500 pages) and have made our own findings which are substantially the same as those reported by the Commissioner.

Respondent was first elected to the office of sheriff for a four-year term beginning January 1, 1957. He has served continuously since that date, his latest term beginning January 1, 1969. A number of the items of alleged misconduct occurred during previous terms and respondent contends that such items may not be considered as grounds for ouster. This question has never been decided in this state. It arose in State on inf. McKittrick v. Graves, 346 Mo. 990, 144 S. W. 2d 91, and in Mosley, supra, but in each case the court found a decision unnecessary and the question was reserved. Annotations in 17 A.L.R. 279, and 138 A.L.R. 753, indicate that the decisions in other states are about equally divided on the issue. We have decided to again reserve the question since we are of the opinion that matters occurring during respondent's current term are sufficient to warrant a decision that respondent has forfeited his office. We hasten to add, however, that evidence of neglect of duty and misconduct during previous terms is admissible and may be considered (1) to the extent that such shows law violations which were still subject to prosecution during the current term, (2) because the showing of a state of facts during prior terms may be considered, the contrary not appearing, as have continued into the current term, and (3) as bearing on respondent's opportunity for knowledge of

the conditions and indicating his attitude toward law enforcement. See Graves and Mosley, supra.

Respondent contends that at least a portion of the allegations are barred by statutes of limitation, citing §§ 516.130 and 541.210. While we are inclined to doubt that those statutes would apply to quo warranto proceeding for removal of an official, our decision to limit causes for ouster to matters occurring during the current term makes it unnecessary to decide the question.

It is also respondent's contention that this proceeding is barred by laches. He cites State on inf. Eagleton v. Champ, Mo. Sup., 393 S. W. 2d 516, a quo warranto proceeding attacking the validity of the incorporation of a village, which obviously has no application to a case such as the instant one. We hold that laches will not be permitted to bar a proceeding instituted by the State or its Attorney General to oust an official for neglect or misconduct. The nature of the proceeding and the inherent public interest preclude the application of that doctrine.

We will next consider the evidence relating to various charges. Pemiscot County is located in the extreme southeast corner of Missouri. Tennessee is just across the Mississippi River, and it is not far to the states of Mississippi and Alabama. It appears from the evidence that large quantities of whiskey had been transported from Caruthersville to dry counties (under local option) in those three states. For example, an officer from Florence, Alabama, testified they would seize about one load of whiskey a week (one load mentioned contained 33 cases) and that 90% of it came from the Delta Distributing Company of Caruthersville.

INCIDENT INVOLVING MISSISSIPPI OFFICERS: In September 1969 five Alcohol Control Agents from Mississippi were sent to Caruthersville to investigate the source of Missouri Whiskey coming into their state. They

started watching the rear of Eddie & Jay's Bar (of which Eddie Chilton was part owner), and the Climax Bar located next door. They saw whiskey from the Climax Bar being loaded into the trunk of a car. After the car was loaded the Missouri license plate was removed and a Mississippi tag was placed on the car. The officers followed the car but at a point in Tennessee the driver evidently discovered that she was being followed and stopped the car. She was arrested by a local sheriff and 29 cases of whiskey were confiscated. The next day the officers resumed their watch on the Bars in Caruthersville and, within a short time, a car arrived, occupied by respondent and Eddie Chilton. According to witness Harper, an agent from Mississippi, Chilton asked them "to get off his back"; that they refused to talk with Chilton but told respondent they would talk with him. Witness Harper continued: "the sheriff turned around and said, 'Damn it, Eddie, let me handle these people.' And at that time I gave the sheriff my identification. He had my driver's license. I pulled my identification out and showed it to the sheriff. I told him I was an enforcement agent from the State of Mississippi, Alcohol Beverage Control Division; told them what we were doing. He says, 'Why didn't you people contact me when you came in here?' * * * I said, 'Well, we had orders from the Jackson office not to contact anybody, to come up here and observe. We are not violating your laws. We haven't done anything and we are just observing. We have made no arrests. We are not bothering anyone.' And he said, 'Well, I don't appreciate you so-and-so's or anybody else coming into my county and snooping around,' and he says to leave the county. And at that time I told him that our office sent us up here, that we would be here until our office told us to go home. He said, 'Well, if you don't leave you will be in my jail,' * * * and that 'if you get in my jail nobody will get you out.' * * * If you are here in the morning you will be in my jail." The agents returned to Mississippi shortly thereafter. Our

Commissioner concluded that "the act of threatening Mississippi Agents Harper and Greer if they did not leave the county constituted willful and malicious oppression and misconduct. The act was an abuse of authority in his official capacity and under color of his office within the meaning of §§ 558.110 and 558.130, RSMo. 1969."

Respondent testified that he investigated these officers because he had had a complaint that they were using binoculars and that had disturbed some of the people. He stated that he introduced himself "to the two people in the car and asked them for their driver's license which they showed me. They told me who they were, where they were from. I asked them why they hadn't asked me to help them. They, I believe, told me that they had instructions from Mississippi not to contact anybody up here, and I told them it had been the policy for anybody coming into the county at least to offer the courtesy of talking. I told them they were disturbing people there and if they didn't move from where they were they would stand a good chance getting in jail here. If I had known they would have been armed, chances are they would have gotten in jail." We agree with the conclusions of the Commissioner as to this incident.

INCIDENT INVOLVING ALABAMA OFFICERS: Our conclusion regarding respondent's conduct in regard to the Mississippi officers is bolstered by an incident occurring in 1967 which involved two Alabama officers. They came to Caruthersville to investigate the source of liquor being transported to Florence, Alabama. Upon arrival they parked and sat in the car for a time. Within a short time two cars approached, one parking in front of their car and the other behind it. The two drivers were respondent and the chief of police of Caruthersville. The Alabama men identified themselves and stated their business to the officers. In the presence of respondent the chief said that the identification didn't mean any-

thing; that there was a motel about eight miles out of town and that they should go out there and get a room because "if we hung around there we would be put in jail." While this statement was made by the chief it is obvious that he and respondent were engaged in a joint investigation or mission of some kind and we think the respondent, by his acquiescence, is to be charged with responsibility therefor. It is true, as respondent points out, that the next morning these men came to respondent's office and gave him a list of known liquor violators and a description of their cars, with a request that if respondent saw any of those cars in Caruthersville to call the officers collect. They were treated courteously by respondent at that time. They returned to Alabama shortly thereafter but never heard from respondent concerning the list they had given him.

Respondent says we cannot consider the threat to the Alabama officers because it was not alleged in the information. We note that no objection was made to the testimony on the ground that it was beyond the scope of the pleadings and hence the information will be regarded as amended to conform to the proof. Harris v. Goggins, Mo.Sup., 374 S. W. 2d 6 [6]. The same situation existed in regard to the Clete Stanfill incident hereinafter described.

FAILURE TO ENFORCE LIQUOR AND GAMBLING LAWS: A large part of the testimony before the Commissioner related to the subjects of open gambling and violation of the liquor laws in various places in Pemiscot County, and particularly in a large number of small cafes generally referred to in the evidence as "joints" or "honky-tonks," patronized largely by Negroes. We will refer as briefly as possible to the evidence in regard to those places. At the outset it should be stated that the Department of Liquor Control inaugurated an undercover investigation of these places in October 1969 which

continued until culminating in a number of raids conducted on January 10, 1970. Duane Franklin, Chief of Enforcement for the Department, testified that in November 1969 he and Agent Burch purchased beer and whiskey at Paul's Place, an unlicensed cafe in Caruthersville, and observed two dice tables there with gambling paraphernalia thereon; that they also observed betting on pool and bowling games at the Kozey Korner in Caruthersville. Trooper Bess, of the Highway Patrol, stated that he observed dice tables in the Flat Top Cafe and in Mac's Bar in Hayti; that he had also observed sales of liquor to minors at Davis Drive-In at Hayti; and that Hayti Heights (located outside the city limits of Hayti) has a reputation for many liquor law violations. Vernon Hopkins, a sergeant with the Highway Patrol, testified that he had been stationed in Hayti between 1955 and 1960 and that he had observed crap tables in most all of the "honky-tonks." Kenneth Howell, a highway patrolman, testified that he had seen dice shooting in progress on a dice table at Slater's Blue Room in Hayti in 1969. Robert Little of the Patrol testified that he had seen dice games in progress on two occasions at the Flat Top in Hayti. Benny Rapert of the Patrol was stationed in Hayti from 1961 to 1965. He testified that he had seen dice games in progress at Cripple Charlie's in Hayti, in Pepper's Inn, and in the Midway Cafe located about three miles northwest of Hayti; that he was always in uniform on these occasions but the participants did not stop shooting when he appeared.

Clifford Cummins, with the Highway Patrol, testified that he had been located in Pemiscot County for three years and had witnessed dice games in operation at the Flat Top and at Covington's Blue Room. Kenneth Ledbetter, now with the Highway Patrol, stated that prior to the last year he had been a telephone installer; that in 1967 and 1968 he had, on several occasions, gone into the back

room at Tommie's Pool Hall in Hayti and observed a dice table and a poker game in progress; that he had seen business men playing cards there with bills piled in front of each player; that he had also repaired the telephone at the Flat Top on several occasions and had seen dice games in progress there several times. Fred McKay, city marshal at Hayti, testified that a delegation of citizens had contacted him about the taverns selling liquor on Sunday; they complained that they "couldn't get to their churches without having to walk over drunks"; that as a result of these complaints he prepared a letter, dated August 13, 1968, which was sent to six places located in Hayti and five places located outside the city limits; that these places were advised that complaints had been made and that they were requested to keep their places of business closed from 1:30 a.m. until 1 p.m. on Sundays. This letter was signed by Clyde Orton, Sheriff, as well as by the Chief of Police and the Mayor of Hayti. Paul Moore, a Patrolman who was in Pemiscot County from 1953 to 1958 testified that he rode with respondent on a number of occasions when he was a deputy sheriff and that they visited a number of these taverns and they saw gambling in all of them; that although they were in uniform the game would often continue after they went in and that sometimes respondent would pick up the dice and tell the participants that they should not be doing that and the game would then stop. Ed Hendricks, an officer with the Hayti Police Department testified that he had observed beer being sold on Sunday at the Flat Top and that he had seen three dice tables in the Flat Top, all of them in operation; that he had seen a crap table in operation at the Big Apple and also at the Little Apple; that gambling took place regularly in these places on weekends. He had also seen crap tables in operation at Ham's Place which was located just behind Mac's Bar. Apparently this witness made no arrests for these violations because he had not been instructed to do so.

Linda Luna worked as a meter maid in Hayti for about 2½ years prior to October 1969. Hayti had a system of granting monthly permits for parking. Miss Luna testified that she went into Ed James' Pool Hall two or three times a week in order to collect from men whose parking permits had expired; that she went to a room upstairs where men were gambling (obviously playing poker); that the men would have stacks of bills in front of them at least two inches high; that she would have on her police uniform but the men kept on playing. Joe Matthews of the Highway patrol stated that he was assigned to Pemiscot County from 1958 to 1961; that he had seen dice games and gambling in a number of places in Hayti; that Pemiscot County had a bad reputation for violation of liquor and gambling laws; "it is a standing joke that if you want to gamble you can come to this county and do it." William R. Barker, an agent for the Liquor Control Department, testified that he observed dice games in operation at Paul's Place in Caruthersville even though a uniformed Caruthersville policeman was present at the time; that he also observed dice tables at Covington's, and that he observed purchases of liquor being made both at Paul's Place and at Covington's, even though neither had a license to sell liquor. William Suddarth, a farmer of Hayti, testified that he had played poker at James' Pool Hall and at Truckers Lounge. Al Reynolds, an agent with the Department of Liquor Control, testified that he was involved in the raid on Covington's Blue Room on January 10, 1970, and that this place was engaged at the time in selling liquor without a license and that from twenty to twenty-five of its patrons were minors. Earl Burch, a Special Agent with the Liquor Control Department, testified that in the fall of 1969 he observed liquor sales and gambling in Paul's Place, Slater's Blue Room, and at the Big Apple, and liquor sale violations at the South End Cafe in Hayti, the City Tavern and O'Malley's Tavern in Steele, and at the Kozey Korner in Caruthersville. Charles Ross, a special investigator for the

Attorney General's office, testified that he began an investigation in Pemiscot County in October 1969; that at the Club Zanza he observed the owner and another person play four games of pool at $20 a game; that he observed a poker game in progress at the Truckers Lounge; that he observed liquor violations at Covington's, Paul's Place, Big LeRoy's, and the Flat Top.

Quite a number of people testified that the reputation of Pemiscot County for violation of liquor and gambling laws was bad. On the other hand, respondent, in presenting his case, presented a larger number of witnesses who testified that the reputation of the county for law enforcement was good and that respondent's reputation as a law enforcement officer was good. Some agents for the Department of Liquor Control who had been located in Pemiscot County testified that respondent had always cooperated with them, as did the judge of that circuit, and a number of sheriffs and prosecuting attorneys from adjoining counties. Most of those officials, and also two ministers from Caruthersville, testified that respondent had a good reputation for law enforcement, and that the county's reputation in that regard was good. Lester Stone, Sheriff of Lake County, Tennessee, located just across the river from Pemiscot County, testified that respondent had a reputation for being a good law enforcement officer and that at one time respondent had notified him of a liquor shipment which was thought to be entering Tennessee. On cross-examination he stated that Eddie Chilton had offered him a bribe of $450 a month to let liquor pass through Lake County, which he had declined.

COCK FIGHTING: There appears to be no question but that cock fighting was carried on near Hermandale in the southern part of Pemiscot County from 1963 until 1967. An arena was constructed in a barn with seats built around it which would seat about 200 people. There were about 180 chicken coops on the inside of the building

upon which were written the weights, name of owner, etc., of roosters that were used in the fights. Spectators from several states attended these fights, and there was considerable evidence of betting at various odds on the fights. One of the spectators testified that steel spurs were fastened to the legs of the roosters and they would fight until one rooster was so disabled he couldn't fight any longer, or possibly killed. These fights were advertised locally by handbills. In May 1967 Leroy Sigmon wrote a column in the Caruthersville Democrat-Argus concerning the evils of this cock fighting operation, and stated that it was made even worse by the fact that young men from the Caruthersville area were attending the fights.

Another item concerning gambling related to the evidence that respondent personally made bets on horse races. Richard Pankey testified that he had been a deputy sheriff for respondent from 1961 to 1964; that on two occasions in the spring of 1964 respondent had called him from Hot Springs and instructed him to call a number in St. Louis and place certain bets on certain horses; that these bets were in large amounts; that the first time the bets totaled about $300, but on the second occasion he bet around $1,500; that he received a return call from St. Louis confirming the bets and that he then called the respondent in Hot Springs to advise him concerning the matter. Pankey was fired by respondent later that year. Some of respondent's witnesses testified that Pankey had a bad reputation for truth, and relator presented other witnesses who testified that Pankey's reputation for truth and veracity was good. Respondent testified that he did not authorize Pankey to make any bets for him and had not made any bets on horse races except when he was personally present in Hot Springs where such betting is legal. However, Patrolman Keefer testified that he heard respondent telephone a bet on a horse race in 1963 and,

on rebuttal, Charles Faris who had been respondent's chief deputy from January 1957 until August 1964 testified that he had heard respondent making calls from the sheriff's office on several occasions placing bets on horse races.

Respondent testified that unless he had complaints he depended largely upon the police departments to police the cities, the State Highway Patrol to patrol the major highways, and the Liquor Control Department to enforce the liquor laws; that he and his deputies were busy with their many and varied other duties, which were recited in detail in the evidence. He denied any conversation with the Alabama officers and denied knowing of the dice games and liquor violations in the various cafes and honky-tonks in the county. He also denied any knowledge of the cock fights in the county.

The Commissioner's findings and conclusions on this point include the following: "During the entire time of respondent's official capacity there were open and notorious violations of the gambling and liquor laws * * *. Respondent knew or should have known of such violations. Respondent's policy was to make no investigations without complaints with reference to such violations unless he saw them. * * * Respondent's position was, as established by his answers, that enforcement of these laws was upon other departments and agencies. In failing to investigate and take action against violators of the liquor laws and gambling laws of Missouri, respondent was guilty of willful violation and neglect of duty and of willful failure and refusal to perform official acts which by law was his duty. His duties as sheriff do not permit him to select the criminal laws he will enforce or the person against whom he will proceed for violations. State v. Mosley, 365 Mo. 711, 286 S. W. 2d 721. * * * Cock fighting with betting and gambling took place from 1963 to 1967 in Pemiscot County. It was open, notorious, and widely publicized. The re-

spondent knew or should have known of these violations of law. Cock fighting, and betting on cock fighting, violate §§ 563.660 and 563.360. By his failure to act in this regard he willfully violated and neglected his duty * * *."

We agree with the findings and conclusions of the Commissioner. While we have not stated all of the evidence we think our abbreviated review thereof is sufficient to demonstrate that there were wide-spread violations of the liquor and gambling laws in Pemiscot County throughout the period respondent has been sheriff, and prior thereto. And, the violations were so open and numerous that we cannot reasonably reach any conclusion other than that respondent knew or should have known of them. There is evidence that he observed gambling operations in a number of these places when he was a deputy sheriff, and all indications are that such continued in the same manner until this proceeding was filed. It seems to us that respondent is bound to have known of the Sunday liquor violations in and around Hayti when he signed the letter requesting that eleven taverns there remain closed until after the Sunday morning church services were completed. And surely cock fights could not have been conducted in that county at an established arena, where crowds would gather after due advertisement, without respondent learning thereof. Patrolman Keefer said the cock fights were common knowledge. Furthermore, the fights were referred to in a newspaper published in the city where respondent lived. And, it is apparent that the people who participated in the various gambling games understood that they would not be disturbed by law officers since they seldom stopped their participation when a uniformed officer appeared—as Patrolman Rapert expressed it, "they didn't miss a lick." When Patrolman Howell was asked why he didn't report the dice games to the respondent and others he stated, "There was no reason for doing so. It is common knowledge."

Respondent [illegible] that he relied on the police to enforce the laws in the cities. And it is apparent from the foregoing factual statement that the various city police officers made little, if any, effort to stop gambling or liquor violations. We answered a similar contention in State on inf. McKittrick v. Williams, 346 Mo. 1003, 144 S. W. 2d 98, as follows: "His [sheriff] authority is county wide. He is not restricted by municipal limits. For better protection and for the enforcement of local ordinance the cities and towns have their police departments or their town marshals. Even the state has its highway patrol. Still the authority of the sheriff with his correlative duty remains. It has become the custom for the sheriff to leave local policing to local enforcement officers but this practice cannot alter his responsibility under the law. Usage cannot alter the law. * * * In every county there are a number of peace officers of varying authority. They and the sheriff must work in harmony. * * * Under these circumstances the sheriff may leave local enforcement in local hands, but only so long as reasonable efforts in good faith are made to enforce the law. * * * A sheriff may assume that a city police department will do its duty in enforcing the law and hence will not be guilty of any serious neglect of duty if he gives little attention to police matters in such city. But this rule has a proper qualification. If the sheriff has reason to believe that the police force is neglecting its duty it is his duty to inform himself. And if he knows that the police are ignoring or permitting offenses his duty to prevent and suppress such offenses is the same as it would be if there were no municipality and no police force. The derelictions of other officials cannot excuse his failure to perform his statutory duties." 144 S. W. 2d l.c. 104, 105. Under the facts in this case we think respondent was charged with the knowledge that no one was enforcing the laws against gambling and illegal liquor sales in Pemiscot County and it was therefore his official duty to make reasonable efforts

to enforce such laws both within and without the cities. As indicated, we hold that he wilfully neglected his duties in that regard.

We agree with the finding of the Commissioner that respondent telephoned bets on horse races from his office. We also agree with respondent that such were not acts done under color of his office. We will not determine whether respondent violated any law in making those bets. However, betting is against the public policy of this State and, to say the least, respondent caused any bookmaker in this State with whom he dealt to violate the law. See § 563.350. This conduct on the part of respondent may properly be considered as an indication of his attitude toward the general subject of law enforcement.

CLETUS STANFILL INCIDENT: Cletus Stanfill was general manager of a radio station in Caruthersville. He witnessed a fight one evening (date not stated) at the Casanova. He later talked with the dispatcher at the sheriff's office who denied any knowledge of the occurrence "and was rude with me and hung the phone up." Thereafter Stanfill made a report on the radio which was critical of the sheriff's office. He testified that respondent then called him and said, "I will contact some of your advertisers and if that doesn't seem to do anything, you are not exactly married to your job. * * * And if that doesn't work we will try something else." These threats constitute another indication of respondent's tendency to be abusive and oppressive.

RETURN OF SLOT MACHINES: In 1962 a raid (in which respondent was not involved) was conducted on a place called The Oasis and certain gambling equipment, including two slot machines, was seized. The slot machines were left with respondent who kept them for about two years and turned them over to the Broadway Music Company. One of them was seen thereafter by a patrol-

man at Curtis Truck Stop in Hayti. Respondent said that the Broadway Music Co. claimed to be the owner of the machines and he turned them over to it after consulting with the prosecuting attorney. Section 563.375 provides the procedure for disposing of machines of that nature. It was not complied with. We agree with the conclusion of the Commissioner that the disposition made was unlawful and that respondent's failure to proceed under the statute constituted a willful neglect of duty and misconduct in office.

FAILURE TO FILE REPORT: Under § 51.150(5) it was respondent's duty to file a report on or before February 15, 1970, listing all salaries and nonaccountable fees received during the preceding calendar year. He did not file the report until about March 15, 1970, after the matter had been publicized in the newspapers. His excuse for not filing on time was that the form had not been furnished him and also that the task had been delegated to an employee. The failure to file the report on time was a neglect of duty. It would not likely be, of itself, a sufficient reason for ouster, but it is a proper matter to be considered along with evidence of other items of neglect.

SALE OF LIQUOR FOR TRANSPORTATION INTO NEARBY STATES: It is reasonable to conclude from his threats to the Mississippi and Alabama officers that respondent did not want anything to occur in Pemiscot County which would discourage persons from dry counties in nearby states from buying liquor in Caruthersville. Except for one instance with Sheriff Stone, he admittedly failed to cooperate with officers from other states in that regard because he "never tried to enforce Alabama and Mississippi laws." He also stated that he had been advised that it was not illegal under Missouri law to haul liquor out of Caruthersville which was destined for dry counties in other states. It seems obvious that respondent

knew these shipments were being made. It is our view that the transportation of more than five gallons of intoxicating liquor is an offense in this State unless certain strict requirements concerning permits, bills of lading, route to be traveled, etc. are complied with. See §§ 311.420 and 311.450. It would appear that the shipments we are considering all involved much more than five gallons and, under the circumstances, it is doubtful that the foregoing statutes were complied with. It is our view that respondent had a duty to make a reasonable effort to ascertain if these laws were being violated and, if so, to make arrests; and that his failure to do so was a willful and intentional disregard and neglect of his duty.

SUMMARY: As heretofore stated we base our judgment in this case upon matters occurring during respondent's current term. Those may be specified as (1) the threats to the Mississippi officers, (2) failure to enforce gambling laws, (3) failure to enforce liquor laws, and (4) failure to timely file the report required by § 51.150(5). We have considered evidence relating to matters occurring in prior terms insofar as they relate to the issues to be actually decided.

We hold that respondent is guilty of willful oppression and abuse of authority as specified in § 558.110, and is also guilty of willful misconduct and neglect of duty and accordingly has forfeited his office under the provisions of § 106.220. He is now guilty of usurping such office and his ouster must go as a matter of course. We are supported in our decision by State on inf. McKittrick v. Wymore, 345 Mo. 169, 132 S. W. 2d 979, State on inf. McKittrick v. Graves, 346 Mo. 990, 144 S. W. 2d 911, State on inf. McKittrick v. Williams, 346 Mo. 1003, 144 S. W. 2d 98, and State on inf. Dalton v. Mosley, 365 Mo. 711, 286 S. W. 2d 721. Our Commissioner, who heard the evidence, did not recommend the imposition of a fine and therefore we will not assess one.

It is ordered that respondent is ousted from the office of Sheriff of Pemiscot County until the end of his present term expiring December 31, 1972, and the costs of this proceeding are taxed against him.

LAWRENCE HOLMAN
Judge

Finch, Acting C.J., Donnelly, Seiler, and Morgan, JJ., and Wolfe, Special J., concur; Bardgett, J., dissents in separate dissenting opinion filed. Henley, C.J., not sitting when cause was submitted.

In the Supreme Court of Missouri
En Banc

State of Missouri, Ex Inf. John C. Danforth, Attorney General,
Relator,
vs.
Clyde Orton,
Respondent.
No. 55,364.

DISSENTING OPINION

(Filed March 8, 1971)

I respectfully dissent. In my opinion, this court cannot entertain jurisdiction of an original action to oust a county official from office under the Constitution of Missouri 1945, Art. VII, § 4, in view of the legislative action in enacting into law § 106.220 et seq., which provisions specifically provide for the procedure to be followed in such cases.

At the outset it must be noted that respondent filed his motion to quash this court's original writ and summons on February 13, 1970, and set forth his reasons therefor, thus there was no delay in asserting his position.

Art. VII, § 4, Constitution 1945, provides: "Except as provided in this constitution, all officers not subject to impeachment shall be subject to removal from office in the manner and for the causes provided by law."

The only officers subject to impeachment under the 1945 Constitution are those set forth in Art. VII, § 1, all of which are elective officials of this state (not county) and the other constitutional officers which are judges of the supreme court, courts of appeals and circuit courts. Art. VII, § 6, provides for the automatic forfeiture of office if a public officer employs certain relatives. This provision is self-executing and quo warranto under § 531.010 et seq., is available as the method of proceeding to oust the official since he has done an act which, under the constitution, automatically causes a forfeiture and, therefore, he is an usurper or intruder. State v. Ellis, Mo., 28 S.W. 2d 363. Respondent does not fall within these categories.

The opening words of Art. VII, § 4, "Except as provided in this constitution" indicate that the removal from office of some officials, not subject to impeachment, has been specifically provided for in other sections of the constitution which, if correct, would explain the reasons for this opening phrase. There are such specific provisions. Art. III, § 18, provides that "Each house . . . shall be sole judge of the qualifications . . . of its own members . . ." This section was held in State ex inf. Danforth v. Banks, Mo., 454 S.W.2d 498, to be exclusive insofar as qualification of the members of the legislature was concerned and not merely as alternative or parallel proceedings to quo warranto when the ouster of a member of the legislature was the subject of the action.

Art. IV, § 17, invests the governor with power to remove all appointive officers without the procedure of impeachment. Thus the constitutional language of Art. VII, § 4, recognized that the constitution itself provided for re-

moval by methods other than impeachment and avoided conflict within itself by the use of the language noted above.

The remaining words of Art. VII, § 4, are "all officers . . . shall be subject to removal from office in the manner and for the causes provided by law." In my opinion this provision of Art. VII, § 4, delegated to the general assembly the authority to provide for the grounds for removal and method of removal from office of all officers other than those subject to removal by impeachment under Art. VII, § 1 or subject to removal by another specific constitutional provision of which Art. III, § 18, relating to members of the general assembly, Art. IV, § 17, relating to appointive officers, and Art. VII, § 6, relating to nepotism, are examples.

I would not hesitate to agree that, in the absence of legislative action implementing Art. VII, § 4, this court retained its power to oust such officials under traditional quo warranto procedures, for the people, in adopting the constitution, could not have intended a vacuum to exist with respect to the ouster of unfaithful public officials.

Therefore, if § 106.220 ended **without** the language, "and may be removed therefrom in the manner provided in sections 106.230 to 106.290", I would agree that the procedure for removal for the causes specified in 106.220 is quo warranto.

Section 106.220 is the statutory provision under which this action was brought. Relator's information alleges that "Respondent, pursuant to Section 106.220, RSMo 1959, has forfeited his said office as Sheriff, and has unlawfully usurped and held such office since January 1, 1957."

Relator having sought the removal of respondent pursuant to § 106.220 should be required to proceed in the

manner provided for in § 106.220 which is the procedure set forth in §§ 106.230 to 106.290.

I hold this view because the 1945 Constitution, Art. VII, entitled "Public Officers", § 4, specifically provides that ". . . all officers not subject to impeachment shall be subject to removal from office in the **manner** and for the **causes** provided by law." (Emphasis mine.) Section 106.220 assumes that the official has lawfully come into office and is not a usurper or intruder or unlawfully holding or executing an office, but that, having come into office lawfully, his **conduct thereafter** was in violation of the duties of his office. Thus Chapter 106 relates exclusively to public officers who have been lawfully elected or appointed and thereafter knowingly, willfully or fraudulently violate their duties.

As stated, in the instant matter relator filed the information seeking removal under § 106.220 which permits removal only, and failed to proceed to remove respondent in the manner provided in §§ 106.230 to 106.290. These procedures provide for the prosecuting attorney to file a complaint in circuit court setting forth in plain and concise language the charge against the official—§ 106.230. The governor may direct the attorney general to assist in the prosecution, and if the prosecuting attorney refuses to file a complaint the attorney general is given authority to file it—§ 106.250. If the action is against a sheriff, the circuit judge shall make an order disqualifying the sheriff and appoint an elisor for the summoning of the jury and performing the duties of sheriff in the trial of the cause—§ 106.260. This action is in the nature of a civil proceeding—§ 106.260. Section 106.280 provides that "in all prosecutions under sections 106.220 to 106.290, the defendant shall, upon conviction, after judgment of removal is entered, be entitled to an appeal to the Supreme Court of Missouri, . . ."

Relator, avoiding the statutory procedures set forth above, utilized either common-law quo warranto procedures under Chapter 531 (Quo Warranto), and thus avoided the respondent's right to jury trial in circuit court and deprived respondent of an appeal to this court should he be found guilty. Additionally, although not assessed, respondent became subject to being fined as provided for in § 531.050 against usurpers, intruders, and those holding office unlawfully.

Finally, the criminal statute—558.110, under which respondent was not charged—is brought into play and respondent is found guilty of willful oppression and abuse of authority as specified in § 558.110.

It is this judicial mixture of causes for removal (106.220) with procedures under a different statute (531.010 et seq.) and conclusions of guilty under a criminal statute (558.110) and concluding with forfeiture and ouster under the first statute (106.220) that I believe is unacceptable and does not, in my opinion, comport with a reasonable interpretation of Art. VII, § 4 of the 1945 Constitution and the various legislative enactments referred to supra.

I realize that this view is contrary to prior decisions of this court, particularly State ex inf. Dalton v. Mosley, Mo., 286 S.W.2d 721, decided in 1956, wherein this court followed the decision of State ex inf. McKittrick v. Wymore, Mo., 119 S.W.2d 944, decided prior to the 1945 Constitution. In Wymore the court held that the 1924 amendment to Art. 14, Sec. 7, Constitution 1875, did not make the provisions of §§ 11202—11209, RSMo. 1929, now §§ 106.220 to 106.290, RSMo 1969, V.A.M.S., the exclusive remedy.

The principal opinion in Wymore held that Art. 14, Sec. 7, Constit. 1875, as amended 1924, provided: "The General Assembly shall, in addition to other penalties,

provide for the removal from office of county, city, town and township officers, on conviction of willful, corrupt or fraudulent violation or neglect of official duty. Laws may be enacted to provide for the removal from office, for cause, of all public officers, not otherwise provided for in this Constitution."

The concurring-in-result opinion of Leedy, J., concurred in by two judges, held that the 1924 amendment repealed the first sentence stated above and substituted therefor the second sentence so that Art. 14, § 7, reads: "Laws may be enacted to provide for the removal from office, for cause, of all public officers, not otherwise provided for in this Constitution." Judge Leedy then held that Art. 14, § 7, of the 1875 Constitution as amended in 1924 was merely permissive and not a constitutional mandate to the general assembly imperatively requiring action by the general assembly and, consequently, saw no conflict between a proceeding in quo warranto as opposed to the provisions of what is now § 106.220 et seq.

The 1945 Constitution, Art. VII, § 4, was in effect at the time State ex inf. v. Mosley, supra, was decided, and Judge Leedy writing for the court held that, since the majority of the court in Wymore saw no limitation in the provisions of the 1924 amendment restricting this court's jurisdiction in quo warranto, he was unable to discern any real difference in meaning or effect between it and the corresponding section of the present constitution, Art. VII, § 4, and, therefore, the doctrine of the Wymore case would be followed.

Whether the constitutional provisions in Wymore were as the principal or concurring opinion held them to be, the Constitution of 1945 nevertheless abandoned that language entirely by completely eliminating the previous constitutional causes for removal found in Art. 14, § 7, to wit: ". . . willful, corrupt or fraudulent violation or ne-

glect of duty," as well as the other language previously employed, and provided that ". . . . all officers not subject to impeachment **shall** be subject to removal from office in the **manner** and for the causes provided by law." (Emphasis mine.)

It is because of this constitutional provision, not the act of the legislature in and of itself, that I believe makes the legislative act, § 106.220 et seq., exclusive as to the procedure to be followed when removal is sought for conduct within the scope of the causes for removal set forth therein, and for this reason I believe Mosley was incorrectly decided on jurisdiction and should be overruled.

In Wymore the principal opinion held that § 11202 (now § 106.220) did not confer any new right and, therefore, was not exclusive but merely cumulative, although recognizing that there is law to the effect that if a new right is created it may be the exclusive remedy. State ex inf. v. Wymore, supra, loc.cit. 945. Although § 11202 (106.220) may not, by itself, have created a new right, it did by its own terms provide for a new procedure as set forth in §§ 11203-11209 (now §§ 106.230-106.290), and the new procedure included a new right—that of a jury trial and, if found guilty, an appeal to this court, §§ 106.260 and 106.280.

In Parker v. Sherman, Mo., 456 S.W.2d 577, Division Two of this court held that a defending sheriff has a right to a jury trial when removal is sought under §§ 106.230 to 106.290, although also saying that this was not the exclusive remedy. It would seem obvious that §§ 106.230 to 106.290 have absolutely no meaning in the absence of § 106.220 since it is by the force of § 106.220 that the subsequent sections become operative.

If relator styles his action an information in the nature of quo warranto, then a commissioner is appointed to take testimony, and, consequently, no jury trial is had and no appeal to this court is afforded. If he styles it a com-

plaint for removal under § 106.230 and files it in circuit court, the respondent is afforded a jury trial and an appeal here. I believe the right to have a jury pass on the credibility of witnesses is a substantial right that cannot be lightly disregarded.

In the instant case, the transcript is replete with contradictory testimony, and the outcome of the case is dependent upon an assessment by the finder of facts as to the credibility of the witnesses. This assessment can best be made by seeing, observing and hearing the witnesses. Where a jury trial is provided for, this function becomes the jury's primary task, and the right to have this task performed by a jury is very important to the litigants.

If § 106.220 et seq. confer the right to a jury trial, which I believe they do, then it does not comport with due process to permit this right to be nullified at the whim of the relator in selecting the name of the action or what court he chooses to file it in.

This court in State ex inf. Anderson v. Consolidated School Dist. No. 4 of Iron County, Mo., 417 S.W.2d 657, 659, rejected an attempt to utilize quo warranto as a substitute for an election contest and held: "The rule is well established in Missouri that the character of a cause of action is determined from the facts stated in the petition and not by the prayer or name given the action by the pleader."

In the instant case, no matter how the action is styled nor whether the prayer asks that forfeiture be declared or the respondent be removed, the cause of action seeks one objective—removal of a public official—and is based on acts within the statutory causes set forth in § 106.220. The action, therefore, should, in my opinion, be governed from beginning to end under §§ 106.220-106.290, RSMo 1969, V.A.M.S.

I will not unduly lengthen this dissent by reviewing all of the cases following Wymore and Mosley, as they rely on Wymore and Mosley. Thus if Wymore and Mosley were incorrectly decided and are overruled, then those cases relying thereon also would be overruled.

I would quash our writ of quo warranto without prejudice to proceed under §§ 106.220 to 106.290, RSMo 1969, V.A.M.S.

.....

JOHN E. BARDGETT

Judge

APPENDIX B

COUNTY AND MUNICIPAL OFFICERS

106.220. Forfeiture of office—reasons for.—Any person elected or appointed to any county, city, town or township office in this state, except such officers as may be subject to removal by impeachment, who shall fail personally to devote his time to the performance of the duties of such office, or who shall be guilty of any willful or fraudulent violation or neglect of any official duty, or who shall knowingly or willfully fail or refuse to do or perform any official act or duty which by law it is his duty to do or perform with respect to the execution or enforcement of the criminal laws of the state, shall thereby forfeit his office, and may be removed therefrom in the manner provided in sections 106.230 to 106.290.

* * * * * * *

106.230. Complaint against officer—duty of prosecuting attorney.—When any person has knowledge that any official mentioned in section 106.220 has failed, personally, to devote his time to the performance of the duties of such office, or has been guilty of any willful, corrupt or fraudulent violations or neglect of any official duty, or has knowingly or willfully failed or refused to perform any official act or duty which by law it was his duty to do or perform with respect to the execution or enforcement of the criminal laws of this state, he may make his affidavit before any person authorized to administer oaths, setting forth the facts constituting such offense and file the same with the clerk of the court having jurisdiction of the offense, for the use of the prosecuting attorney or deposit it with the prosecuting attorney, furnishing also the names of witnesses who have knowledge of the facts constituting such offense; and it shall be the duty of the prosecuting

attorney, if, in his opinion, the facts stated in said affidavit justify the prosecution of the official charged, to file a complaint in the circuit court as soon as practicable upon such affidavit, setting forth in plain and concise language the charge against such official, or the prosecuting attorney may file such complaint against such official upon his official oath and upon his own affidavit.

* * * * * * *

106.240. Appointment of special prosecutor.—Upon the filing of the affidavit as provided in section 106.230, against any prosecuting attorney, the judge of the circuit court of said county may appoint a special prosecutor, who shall have power and authority to file a complaint, as provided in section 106.230, against said prosecuting attorney.

* * * * * * *

106.250. Action by attorney general.—When an affidavit has been filed with the clerk of the circuit court of any county in this state, as provided in sections 106.230 and 106.240, the governor may, in his discretion, direct the attorney general to assist in the prosecution against said officer; and in case the refusal of the prosecuting attorney or special prosecutor, after the filing of the affidavit provided for in sections 106.230 and, 106.240, to file a complaint, the attorney general shall have authority to file a complaint against the official complained of.

* * * * * * *

106.260. Appointment of special sheriff.—In any proceedings instituted under the provisions of sections 106.220 to 106.290, the attorney general, prosecuting attorney or special prosecutor appointed by the court may file with the clerk of the circuit court an affidavit that he believes the sheriff of said county is disqualified from summoning a fair and impartial jury for the trial of said cause, by

reason of the fact that he is related to the defendant, or is interested or prejudiced in his favor to such an extent that he will not, in the opinion of said attorney general, prosecuting attorney or special prosecutor, summon a fair and impartial jury, and the judge may, in his discretion, thereupon make an order disqualifying said sheriff from summoning the jury in said cause, and appoint an elisor, who shall have the same power as the sheriff in the summoning of the jury, and perform the duties of the sheriff in the trial of said cause, provided, that in case the said proceeding shall be against the sheriff of any county, the judge shall make an order disqualifying him, and appoint an elisor for the summoning of the jury and performing the duties of the office of the sheriff for the trial of said cause.

* * * * * * *

106.270. Removal of officer—vacancy, how filled.—If any official against whom a proceeding has been filed, as provided for in sections 106.220 to 106.290, shall be found guilty of failing personally to devote his time to the performance of the duties of such office, or of any willful, corrupt or fraudulent violation or neglect of official duty, or of knowingly or willfully failing or refusing to do or perform any official act or duty which by law it is made his duty to do or perform with respect to the execution or enforcement of the criminal laws of the state, the court shall render judgment removing him from such office, and he shall not be elected or appointed to fill the vacancy thereby created, but the same shall be filled as provided by law for filling vacancies in other cases. All actions and proceedings under sections 106.220 to 106.290 shall be in the nature of civil actions, and tried as such.

* * * * * * *

106.280. Right of appeal.—In all prosecutions under sections 106.220 to 106.290, the defendant shall, upon conviction, after judgment of removal is entered, be entitled to an appeal to the supreme court of Missouri, and said cause shall have precedence in said court on such appeal, and such supreme court shall hear such appeal as soon as possible. Pending such appeal such officer shall be suspended from office, and the trial court shall appoint a resident of the county, qualified in law, who shall act as such special officer pending the appeal; and if the decision on said appeal in said supreme court shall be in favor of the defendant, he shall be entitled to the pay for the time for which he was removed. The person acting as such officer during such appeal shall be entitled to the same compensation of a duly elected officer. The costs herein provided for shall be taxed against and paid by the county in which said proceedings originated. And the fee of any prosecuting attorney, as provided for in sections 106.220 to 106.290, shall be a reasonable one, fixed by the court, and payable out of the county treasury.

* * * * * * *

558.110. Oppression in office.—Every person exercising or holding any office of public trust who shall be guilty of willful and malicious oppression, partiality, misconduct or abuse of authority in his official capacity or under color of his office, shall, on conviction, be deemed guilty of a misdemeanor.

* * * * * * *

563.410. Throwing dice, betting—playing with minor.—If any person shall play at any game whatsoever for money, property or gain, with cards, dice, or any other device which may be adapted to or used in playing any game of chance, or in which chance is a material element, or shall bet or wager on the hands or cards or sides of such as do

play as aforesaid, every such person shall be deemed guilty of a misdemeanor, and upon conviction be punished by a fine of not less than twenty-five nor more than two hundred dollars; provided further, that every adult person who shall play at any game whatsoever for money or property or gain, with any minor under the age of twenty-one years, with cards, dice or other device, as aforesaid, with or without the consent of the parent or guardian of said minor, or shall bet or wager on the hands or cards or sides of such game in which said minor shall play, as aforesaid, shall, on conviction, in addition to the penalty above set forth, be confined in the county jail for a term not less than ten days nor more than six months.

* * * * * * *

311.420. Transporter's license—fee—bond—qualifications of licensee.—1. No person shall transport into, within, or through the state of Missouri any intoxicating liquors in quantities larger than five gallons who is not the holder of a license or permit from the supervisor of liquor control of the state of Missouri so to do. For such license, there shall be paid to the director of revenue the sum of ten dollars per annum. Application for such license shall be made to the supervisor of liquor control of the state of Missouri and each applicant shall submit with his application a bond in the penal sum of one thousand dollars with sufficient surety to be approved by the supervisor of liquor control, conditioned that he will not violate any provisions of the liquor control laws of this state or any regulation promulgated thereunder, and any violation of such condition shall work a forfeiture of said bond to the state of Missouri. The license year shall end on June thirtieth, and the applicant shall pay as many twelfths as there are months (part of a month counted as a month).

* * * * * * *

311.450. Bill of lading to accompany transported alcoholic liquors—contents—inspection.—Any alcoholic liquors in excess of five gallons being transported into, within, or through the state of Missouri shall be accompanied at all times during transportation by a bill of lading or other memorandum of shipment, showing an exact description of the alcoholic liquors being transported, the name and address of the consignor, the name and address of the consignee, the route to be traveled by such vehicle while in Missouri, and the vehicle transporting such liquors shall not vary from said route. Said bill of lading or memorandum shall be shown to the supervisor of liquor control or any peace officer of this state upon demand. The name of the consignor on any such bill of lading or other memorandum of shipment shall be the name of the true consignor of the alcoholic beverages being transported and such consignor shall only be a person who has the legal right to make such shipment. The name of the consignee on such bill of lading or memorandum of shipment shall be the true consignee of the alcoholic beverages being transported and who has previously authorized in writing the shipment of the alcoholic beverages being transported and who has a legal right to receive such beverages at the point of destination shown on the bill of lading or other memorandum of shipment.

* * * * * * * *

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
AUG 5 1971
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-58

CLYDE ORTON,
Petitioner,

vs.

THE STATE OF MISSOURI, ON INFORMATION OF JOHN C. DANFORTH, ATTORNEY GENERAL,
Respondent.

ON PETITION FOR CERTIORARI TO THE SUPREME COURT OF MISSOURI

BRIEF OF RESPONDENT IN OPPOSITION

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OPINION BELOW

An opinion in a related case is *State ex rel. Danforth* v. *Alford*, 467 S.W.2d 55 (Mo. 1971), holding that the disqualification of the present petitioner from office applied to the entire term for which he had been elected.

ARGUMENT

I.

The petitioner has failed to preserve for review by this Court any claim arising under the Constitution or laws of the United States.

The case disclosed by the opinion of the Supreme Court of Missouri, appended to the petition, is simply one of state procedures for removal of public officers. No question arising under the Constitution or laws of the United States is disclosed there.

The obvious reason is that the petitioner raised no such question before that court. Petitioner's brief in the Supreme Court of Missouri contains six pages of "Points Relied On," with authorities, as is required by the rules of that court. There is not a single federal constitutional citation, nor a single point relating to any federal question.

The Missouri courts have consistently held that points which are not set out in the brief are waived. See, e.g., *Ayres* v. *Keith,* 355 S.W.2d 914 (Mo. 1962).

They also hold that federal constitutional questions are waived unless they are raised at the first opportunity. *Witt* v. *City of Webster Groves,* 383 S.W.2d 723 (Mo. 1968).

Each of the questions set out on pages 3 and 4 of the petition was available at the time of submission of the case to the Supreme Court of Missouri. When a point is ascertainable at the time of submission, it may not be raised for the first time in a motion for rehearing. *Ackerman* v. *Globe-Democrat Publishing Company,* 368 S.W.2d 469 (Mo. 1963), cert.den. 375 U.S. 949. The exception as to the rare case in which the court injects a federal question in its opinion (cf. *Brinkerhoff-Faris Trust and Savings Com-*

pany v. Hill, 281 U.S. 673, 74 L.Ed. 1107, 50 S.Ct. 451 (1930)), has no application here.

The petitioner has not complied with the reasonable procedural requirements of state law in the presentation of federal questions, nor has he sustained the burden imposed by this Court's Rule 23 (1) (f) of showing that he has done so. The petition should be denied for these reasons alone.

II.

The "questions presented" as set out in the petition fail to show any substantial federal question.

1. The sufficiency of pleadings is manifestly a matter for state law. Quo warranto is distinctly a civil action. *State ex inf. Connett* v. *Madget*, 297 S.W.2d 416 (Mo. 1956). The petitioner's criminal citations are not in point. In civil actions the rules of pleading are less rigid than in criminal cases, and the court may permit pleadings to be amended, or may treat them as amended, in order to conform to the proof. See Missouri Supreme Court Rule 55.54, which is essentially the same as Rule 15 (b), F.R.C.P. A party who claims undue surprise should ordinarily move for a continuance to meet the assertedly new allegations. Petitioner makes no showing of having done so.

2. The second "Question" is singularly lacking in merit since the procedure of the Supreme Court of Missouri in cases within its original jurisdiction is essentially the same as that followed by this Court. Cf. *Utah* v. *United States*, ... U.S. ....., 29 L.Ed.2d 279, 91 S.Ct. 1775 (1971), in which a Senior Circuit Judge served as Special Master. As the opinion below shows, the court did not consider itself bound by the Commissioner's findings and made its own independent evaluation (A-4). There is no requirement that a court of the appellate type hear the witnesses

in original actions. *LaBuy* v. *Howes Leather Company,* 352 U.S. 249, 1 L.Ed.2d 290, 77 S.Ct. 309 (1957), reh.den. 352 U.S. 1019, did not purport to establish a constitutional rule, but simply held that under the Federal Rules of Civil Procedure a trial judge should ordinarily hear the evidence himself rather than referring the case to a master. The opinion did not have any application to proceedings in a multi-judge court which normally hears only appeals. The time allowed for oral argument before the court, furthermore, is wholly within the court's discretion. There is, in fact, no requirement that the court hear counsel orally. This Court disposes summarily of many cases within its mandatory appellate jurisdiction.

3. A state is not required to afford trial by jury in civil cases. This has been held in a series of cases going back as far as *Pearson* v. *Yewdall,* 95 U.S. 294 (1877), and is reinforced, *a fortiori,* by the recent opinion of this court in *McKeiver* v. *Pennsylvania,* ..... U.S. ....., ... L.Ed.2d ....., 91 S.Ct. 1976 (1971), holding that a state is not obliged to grant trial by jury in juvenile proceedings. The absence of a requirement of trial by jury applies especially to extraordinary proceedings such as those in quo warranto. 50 C.J.S., Juries, Section 51. The Supreme Court of Missouri held in *State ex inf. McKittrick* v. *Williams,* 346 Mo. 1003, 144 S.W.2d 98 (1940), that the constitutional provisions giving it original jurisdiction in cases involving extraordinary writs contain the fair implication that trial by jury was not to be required in those cases. This was a choice that the state was free to make. The state also has the authority to provide alternate remedies for removing officials for misconduct, as Missouri's courts hold it has done in its constitution and statutes.

4. The opinion below is replete with evidence in support of the findings. The lengthy argument in the petition

simply asks this court to reweigh the evidence which has already been considered by the Commissioner and the court below, and whose respective findings concur. This is clearly out of order. The petition admits (p. 23) that the petitioner did not enforce gambling laws. There is no constitutional obligation on the state court to accept his argument that these laws were unimportant.

The factual support for a finding of misconduct by a state officer is distinctly a state matter. There is no violation of the petitioner's substantive or procedural rights such as to justify this Court's interposition.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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